to construe that word in any other way is justifiable in the circumstances without doing violence to the language used – it seems apparent that "sent" does not include "attendance". Whatever the difficulties of sending the draft index by post may be, I think they could be met by delivering the draft index by hand, and not necessarily by an advocate. The advocates for the respondents have forty-eight hours after service to raise their objections, if any, and if this is not done within the time limit, then I think that they may be taken to have no objection. Does delivery by hand entail "attendance" within the meaning of item 58? In my view, "attendance" must mean necessary and proper attendance. In this connection, it is not considered that, just handing over a document or documents to a person would mean that this constitutes "attendance" on him: a post-man does not attend upon a person when he delivers a letter to that person. As to the practice of obtaining the approval concerned after handing over the draft index, it may be a convenient practice, but the relevant rule in my view, does not require this, particularly in view of the time limit imposed. The practice mentioned does not, in my opinion, constitute a "necessary" attendance within the meaning of item 58 of the Scale of Costs. For the reasons given, item 43 of the Appellant's Bill of Costs should be disallowed.

Pursuant to Order 59, rule 36(5), I therefore order that the certificate of the Deputy Registrar dated February 8, 1982 be so amended as to accord with this judgment.

Order accordingly.

Solicitors: *Battenberg & Talma; T.O. Thomas*

PUBLIC PROSECUTOR v. YEE KIM SENG

[O.Cr. J. (Ajaib Singh J.) September 16, 1982]
[Ipoh – Criminal Trial No. 12 of 1980]

Criminal Law and Procedure – Mandatory death sentence for offence under Internal Security Act, 1960 – Whether unconstitutional – Deprivation of life or personal liberty in accordance with law – Provision of offences and penalties necessary in order to stop or prevent subversion – Equality before the law – Power of Attorney-General to decide under which law he would charge a person – Fact that court has no alternative does not make the mandatory death sentence unconstitutional – Federal Constitution, arts 5(1), 8(1), 12(1) & 149(1) – Internal Security Act, 1960, s. 57(1)(b).

Constitutional Law – Whether mandatory death sentence prescribed under Internal Security Act, 1960 unconstitutional – Federal Constitution, Articles 5(1), 8(1), 121(1) and 149(1).

In this case the accused had been charged for being in possession of a hand-grenade in a security area without lawful excuse and without lawful authority, an offence punishable with death under section 57(1)(b) of the Internal Security Act, 1960. Counsel for the accused raised a preliminary issue and submitted that the mandatory death sentence prescribed under section 57(1)(b) of the Internal Security Act 1960 is unconstitutional as it infringes articles 5(1), 8(1), 12(1) and 149(1) of the Federal Constitution.

Held: (1) article 5(1) of the Federal Constitution is not infringed because the accused is not going to be deprived of his life or personal liberty except in accordance with law, that is, the Internal Security Act, 1960,;

(2) Section 57(1)(b) of the Internal Security Act, 1960, does not contravene Article 149(1) of the Federal Constitution because to stop or prevent subversion it is necessary to provide for offences and penalties;

(3) the fundamental right of equality before the law and to the equal protection of law are not violated by the fact that the accused is charged under section 57(1)(b) of the Internal Security Act and not under section 8 of the Arms Act, 1960, as the Attorney-General has the power under the Constitution at his discretion to institute, conduct or discontinue criminal proceedings for any offence and it is up to the Attorney-General to decide if he would charge any person and under which law depending on the evidence available to him;

(4) the fact that the court has no alternative does not make the mandatory death sentence unconstitutional. The courts are concerned with the administration of the law and they are obliged to administer the law as found in the statute books.

Case referred to:

(1) *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64.

CRIMINAL TRIAL.

Mokhtar bin Ali (Deputy Public Prosecutor) for the Public Prosecutor.

Ngeow Yin Ngee for the accused.

Cur. Adv. Vult.

Ajaib Singh J.: The accused in this case is charged for being in possession of a hand-grenade in a security area without lawful excuse and without lawful authority which is an offence punishable with death under section 57(1)(b) of the Internal Security Act 1960. Mr. Ngeow Yin Ngee for the accused has raised a preliminary issue and submits that the mandatory death sentence prescribed under section 57(1)(b) of the Internal Security Act is unconstitutional as it infringes

articles 5(1), 8(1), 121(1) and 149(1) of the Federal Constitution.

Article 5(1) states that "no person shall be deprived of his life or personal liberty save in accordance with law." Mr. Ngeow Yin Ngee submits that article 5(1) should be considered together with article 149(1) of the Federal Constitution in order to decide whether or not the mandatory death sentence under section 57(1)(b) of the Internal Security Act is constitutional. Article 149(1) reads as follows –

149(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation –

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the security of the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of the Article 5, 9, 10 or 13 or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

The recital in the Internal Security Act is in the following terms –

"Whereas action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia –

(1) to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property; and

(2) to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established;

And whereas the action taken and threatened is prejudicial to the security of Malaysia;

And whereas Parliament considers it necessary to stop or prevent that action;

Now therefore pursuant to Article 149 of the Constitution be it enacted by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Ra'ayat in Parliament assembled, and by the authority of the same, as follows:"

Mr. Ngeow Yin Ngee submits that section 57(1)(b) of the Internal Security Act is not "designed to stop or prevent" either of the two actions recited in the Act. Section 57(1)(b) has created an offence and has prescribed a penalty. This is not pursuant to but is contrary to article 149(1). This article is clearly meant to provide for legislation aimed at stopping or preventing any of the actions listed in it but it is not meant to create offences and prescribe penalties. Mr. Ngeow Yin Ngee refers to section 8(1) of the Internal Security Act which provides for preventive detention and submits that this section 8(1) unlike section 57(1)(b) conformed to article 149(1) for it is designed to prevent persons from acting in any manner prejudicial to the security of the country.

Next Mr. Ngeow Yin Ngee submits that section 57(1)(b) contravenes article 8(1) which states that "all persons are equal before the law and entitled to the equal protection of the law." He says that the whole of Malaysia is a security area and there is discrimination when some persons are charged for possession of arms or ammunition as an offence in a security area under the Internal Security Act which carries the mandatory death sentence while other persons are charged for possession of arms or ammunition without licence under section 8 of the Arms Act 1960 which is an offence punishable not with death but with only a term of imprisonment or a fine. Mr. Ngeow Yin Ngee submits that because of this discrimination the charge framed against the accused is unconstitutional as it offends article 8(1) of the Federal Constitution.

Lastly it is submitted that under article 121(1) of the Federal Constitution the judicial power is vested in the High Court and as such the court should have a discretion in assessing sentence. A mandatory death sentence is unconstitutional because it deprives the court from exercising any discretion on the question of sentence.

With respect I do not agree with any of the points raised by Mr. Ngeow Yin Ngee. Article 5(1) of the Federal Constitution is not infringed because the accused is not going to be deprived of his life or personal liberty except in accordance with law. And the law in this case is the Internal Security Act which is a perfectly valid law passed by Parliament. Section 57(1)(b) of the Internal Security Act does not contravene article 149(1) of the Federal Constitution. In order to stop or prevent subversion it is necessary to provide for offences and prescribe penalties. Without suitable

sanctions the Internal Security Act would be inadequate and ineffective to achieve its purpose which is "to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto."

The fundamental right of equality before the law and to the equal protection of the law are not violated by the fact that the accused is charged under section 57(1)(b) of the Internal Security Act and not under section 8 of the Arms Act. Under article 145(3) of the Federal Constitution the Attorney-General has the power exercisable at his discretion to institute, conduct or discontinue criminal proceedings for any offence. It is up to the Attorney-General to decide if he would charge any person and under which law depending on the evidence available to him. The power relating to criminal proceedings as set out in article 145(3) is vested in the most high-ranking law officer in the country and as such it must be presumed that he would exercise his power fairly and in the best interests of justice. Therefore if the exercise of his power under article 145(3) is to be challenged it must be shown to the satisfaction of the court that in exercising his power the Attorney-General acted in bad faith or that he acted outside the scope of article 145(3) of the Federal Constitution. In the present case there is no evidence of bad faith on the part of the Attorney-General nor is there any suggestion that he acted beyond his power under article 145(3). The decision to charge the accused under the Internal Security Act and not under the Arms Act was a legitimate exercise of the Attorney-General's power under article 145(3) of the Federal Constitution and it cannot be challenged as unconstitutional.

Under article 121(1) of the Federal Constitution the High Court is vested with the judicial power of the Federation which means that the court has power to adjudicate in civil and criminal matters which are brought before the court. In criminal trials the High Court is empowered to pass sentence according to law and if the law prescribes a mandatory death sentence the High Court has no choice but to pass that sentence. The fact that the court has no alternative does not make the mandatory death sentence unconstitutional. In the case of *Ong Ah Chuan* v. *Public Prosecutor*[1] which went up on appeal from the Singapore Court of Criminal Appeal to the Privy Council Lord Diplock had this to say on mandatory death sentences –

> "There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not. At common law all capital sentences were mandatory; under the Penal Code of Singapore the capital sentence for murder and for offences against the President's person still is. If it were valid the argument for the appellants would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital – an extreme position which counsel was anxious to disclaim."

The courts are concerned with the administration of law and they are obliged to administer the law as it is found in the statute books. Whether or not the death sentence is morally right or wrong is a matter not for the courts but for Parliament to decide. It may not be out of place however to mention here that in order to mitigate the extreme sentence of death there is provision for review by the Pardons Board and in suitable cases death sentences are commuted to life imprisonment and even to lesser terms of imprisonment.

In my view and for the reasons I have stated the constitutional validity of section 57(1)(b) of the Internal Security cannot be challenged. The Internal Security Act with all the provisions therein is perfectly valid and there is nothing in the Act which contravenes the Federal Constitution. I accordingly rule against the preliminary issue raised by the defence.

Order accordingly.

Solicitors: *Ngeow & Co.*

THONG CHUAN CHING & ANOR. v. TOSHIBA ELECTRONIC MALAYSIA SDN. BHD.

[O.C.J. (Vohrah J.) October 19, 1982]

[Kuala Lumpur – Civil Suit No. 141 of 1975]

Practice & Procedure – Non-compliance with Practice Rules – Inexcusable delay on plaintiffs' part – Action dismissed – R.H.C. 1980, O. 34 r. 3

The writ in this case was issued by the plaintiffs on January 23, 1975. It claimed against the defendants damages for breach of contract. This was followed by a Memorandum of Appearance dated March 13, 1975, a Statement of Defence dated April 5, 1975; an entry of action for trial dated April 6, 1976; and a Notice of trial dated April 7, 1976. All the said documents were filed but no date was